STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 42-81:

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Complainant,

- vs -

HONORABLE L.C. ALLEN, MAYOR OF GLENDIVE, and ALL REPRESENTATIVES THEREOF,

Defendant.

FINAL ORDER

* *

No exceptions having been filed, pursuant to ARM 24.26.215, to the Findings of Fact, Conclusions of Law and Recommended Order issued on May 27, 1982, by Hearing Examiner Rick D'Hooge;

THEREFORE, this Board adopts that Recommended Order in this matter as its FINAL ORDER.

DATED this 9th day of July, 1982.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

* *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 12 day of July, 1982:

American Federation of State, County and Municipal Employees
AFL-CIO
600 North Cooke Street
Helena, MT 59601

Mayor of Glendive
City Hall
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Gerald J. Navratil
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Jennifer Jackson

STATE OF MONTANA
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AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

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HONORABLE L. C. ALLEN, MAYOR OF GLENDIVE and ALL REPRESENTATIVES THEREOF,

Defendant.

* * * * * * * * * * * * * * *

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

* * * * * * * * * * * * * * *

American Federation of State, County and Municipal Employees (Union, AFSCME) filed an unfair labor practice charge against the Honorable L.C. Allen, Mayor of Glendive and all representatives thereof (City) alleging that the City refused to comply with the settlement reached and failed to execute an agreement embodying the settlement reached. Because the Board of Personnel Appeals has little precedent in some areas I will cite federal statute and case law for guidance in the application of Montana's Collective Bargaining Act, Title 39, Chapter 31, MCA (ACT). The federal statute will generally be the National Labor Relations Act, 29-U.S.C., Section 151-166 (NLRA). The Montana Supreme Court, when called upon to interpret the Montana Collective Bargaining for Public Employees Act, has constantly turned to National Labor Relations Board (NLRB) precedent for guidance. (State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785, 1974; AFSCME Local 2390 v. City of Billings, 555 F.2d 507, 93 LRRM 2753, 1976 State of Montana ex. rel., Board of Personnel Appeals

v. District Court of the Eleventh Judicial District, 598 P.2d 1117, 36 State Reporter, 1531, 1979; Teamsters Local 45 v. Board of Personnel Appeals and Stuart Thomas McCarvel, 635 P.2d 1310, 38 State Reporter 1841, 1981).

At the hearing held February 9, 1982, the parties stipulated that the Defendant is a public employer as defined by the Collective Bargaining Act; that the Complainant is a labor organization as defined by the Collective Bargaining Act; and that the Board of Personnel Appeals has jurisdiction of this Complaint.

I. FINDINGS OF FACT

After a thorough review of the testimony, exhibits, post-hearing briefs and reply brief, I make the following findings of fact:

1. The July, 1980 - June, 1981 collective bargaining agreement between the parties contained the following relevent article;

Article XVI - Health Safety and Welfare

. . . .

> B. Health and/or Accident Insurance - The Employer shall pay the full premium of such insurance for each employee desiring such coverage for himself and/or his dependents. There shall be no reduction of group insurance coverage, however, the group insurance coverage may be increased or insurance carriers may be charged with approval of the Glendive City Council
>
> (Joint Exhibit V)

The relevant sections of Montana statute in this dispute are:

. . . .

> 2-18-702. Group insurance for public employees and officers. (1) All counties, cities, towns, school districts, and the board of regents shall upon approval by two-thirds vote of their respective officers and employees enter into group hospitalization, medical, health, including long-term disability, accident, and/or group life insurance contracts or plans for the benefit of their officers and employees and their dependents.

. . . .

7-32-4117. Group insurance for policemen - funding. (1) Cities of all classes, if they provide insurance for other city employees under Title 2, chapter 18, part 7, shall:

(a) provide the same insurance to their respective policemen;

(b) notwithstanding Title 2, chapter 18, part 7, pay no less than the premium rate in effect as of July, 1980, for insurance coverage for policemen and their dependents;

(c) provide for collective bargaining or other agreement processes to negotiate additional premium payments beyond the amount guaranteed by subsection (1)(b).

. . . .

Compiler's Comments

1981 Amendment: Substituted the requirement that cities are to pay no less than the premium rate in effect as of July 1, 1980, for insurance coverage for policemen and their dependents for the requirement that cities pay 100% of the premium for insurance coverage for each policeman and his dependents in (1)(b); added subsection (1)(c).

. . . .

7-33-4130. Group insurance for firefighters - funding. (1) Cities of the first and second class, if they provide insurance for other city employees under Title 2, chapter 18, part 7 shall:

(a) provide the same insurance to their respective firefighters;

(b) pay no less than the premium rate in effect as of July, 1980, for insurance coverage for firefighters and their dependents notwithstanding Title 2, chapter 18, part 7;

(c) provide for collective bargaining or other agreement processes to negotiate additional premium payments beyond the amount guaranteed by subsection (1)(b).

. . . .

Compiler's Comments

1981 Amendment: Substituted the requirement that first- and second-class cities are to pay no less than the premium rate in effect as of July 1, 1980, for insurance coverage for firefighters and their dependents for the requirement that cities pay 100% of the premium for insurance coverage for each firefighter and his dependents in (1)(b); added subsection (1)(c).

The Mayor knew about the above changes in the statute when the legislation left the legislature. Mr. Gerald Kuester, City Councilman, knew of the above changes in the statute sometime before May 20, 1981.

2. By letter to the City Council, the Union requested negotiations. The City Council minutes of May 4, 1981 reflect the following:

> AFSCME -- Local 852 requested a negotiation meeting seperate from a regular council meeting before finalizing of budget. Council agreed to meet May 20, 1981 as follows:
>
> | | |
> |---|---|
> | 7:00 P.M. | Union Members |
> | 7:30 P.M. | Police Department |
> | 8:00 P.M. | Fire Department |
> | 8:30 P.M. | Department Heads |
>
> (Joint Exhibit VI)

3. On May 20, the Union gave the following proposal to the city:

. . . .

> Proposal's for negotiations for the Glendive City Employees Local 852.
>
> Wages - increase each classification by 1.50 per hour.
>
> Supervisory personnel shall not operate equipment. Employees covered by this agreement shall be trained to operate City equipment thus enabling employees to bid on and receive upgrade positions.
>
> Any over-time work covered by the Agreement between the City of Glendive and Local 852 shall be done by the classification for which the over-time is to be done.
>
> (Joint Exhibit IV).

This was the first negotiating meeting between the parties for a new collective bargaining contract. At this meeting, there was no discussion about insurance. The City requested a postponement of further negotiations until late July when the value of the tax mill would be known. The Union was in agreement.

4. A few days before June 26, 1981, at the fire hall, a meeting was held between a few city workers, city department heads, city elected officials, and two health insurance group representatives - Blue Shield, Blue Cross. Mr. Wilber Wallace, Public Works Director, informed the department heads of the insurance meeting. The department heads were instructed to inform the city workers of the insurance meeting. Very few city workers attended the insurance meeting. The representatives of Blue Shield and Blue Cross presented their respective plans and cost. Shirley L. Mohr, City Clerk, stated that the concept of the employees paying part of the insurance premiums or all of the increase in insurance premiums was not talked about at this meeting. Mr. Mike Cash, City Worker/Meterman, stated that who paid for the increased insurance costs was not an issue at this meeting.

5. Before the special meeting of the City Council on June 26, 1981, the Mayor had conversations first with a person or persons from the Fire Department, second with a person or persons from the Police Department, and finally with Jim Hyatt, Vice President of AFSCME Union Local 852 and Chairman of the negotiating committee, from the City crew. The Fire and Police representatives both stated they will go along with whichever insurance plan a majority of the employees preferred. During the conversation with Mr. Hyatt, which took place at the City Shop area, Mr. Hyatt told the Mayor that it sounded like the employees would go with Blue Cross insurance group. The Mayor communicated these conversations to the City Council.

The minutes of the special City Council meeting reflect the following:

. . . .

Purpose of the meeting to determine which Hospitalization program for fiscal year 1981-1982.

Discussion was had to determine between Blue Shield or Blue Cross. Rates proposed are as follows:

	BLUE SHIELD (NEW)	BLUE CROSS	BLUE SHIELD (OLD)
Single	51.08	38.50	34.05
Couple	185.00	74.20	70.00
Family	122.27	90.95	81.51
Single over 65	20.76	28.90	16.83
Two party over 65	41.52	64.60	33.66

Majority of the employees favored Blue Cross. The past legislation passed a bill setting the maximum insurance premium which cities and towns have to pay as set last July, 1980. Whatever increase in premium could be paid by the cities and towns or negotiated when setting their salaries. Majority of the employees stated if the increase would reflect their salaries they would prefer Blue Cross with a less premium.

Motion by Kuester, second by Taylor and unanimously carried to award the insurance contract for Fiscal year 1981-1982 to Blue Cross as proposal was submitted.

(Joint Exhibit I).

At the City Council meeting some of the department heads and a few of the city workers were present. A majority of the city workers were not present. The department heads and city workers exercised an opportunity for public input at the City Council meeting. Mr. Hyatt stated that if the workers had to pay part of the insurance premiums, the workers would like Blue Cross because it would be cheaper; that to some extent there was an understanding on the part of the workers the City would have the workers pay part of the insurance premiums; and that he asked the Mayor if which insurance companies and who pays for the insurance was negotiable and the Mayor said "I don't know". Shirley L. Mohr could not recall any questions being asked of the Mayor as to the negotiability of which insurance companies or who pays the increased insurance premiums. Shirley L. Mohr and Mr. Hyatt both agree that the City employees and/or those

present at the City meeting did not vote on which insurance they preferred. Shirley L. Mohr and Mr. Cash both agreed that Mr. Hyatt was the spokesman but Mr. Hyatt stated he could not speak for the Union membership. Mr. Cash adds that Mr. Hyatt could not speak for the membership because there was no meeting of the Union membership to formulate a union opinion. When asked was the matter of deductions for insurance premiums discussed, the Mayor answered "I do not believe so."

6. A special meeting of the City Council was held on July 27, 1981. The City Council minutes state the following:

. . . .

> Budget was reviewed. Council directed Clerk to re-figure all salaries at 10% and the additional hospitalization premiums applied as payroll deductible.
>
> (Joint Exhibit 11).

Mr. Hyatt was present at the meeting but had no recall of the above statement.

Unable to state with certainty because she does not do the payroll, Shirley L. Mohr believes the City started deducting the increased insurance premium cost from the July or August paychecks of the workers. The City was informed of the value of the tax mills about mid-July.

7. The August 17th meeting of the City Council minutes reflect the following:

. . . .

> AFSCME AFL-CIO #852 Nadeen Jensen representative for AFSCME was present to finalize wage negotiations for the crew. Mayor Allen stated the increase in wages for the crew and all City Employees was 10%. He was aware of their requesting a 10% increase for all employees. The representative also inquired regarding the change in language of the contract. Mayor Allen stated he was not aware of any changes. She requested to meet with the Union Employees and report back to the Council, this was agreeable with the Council.
>
> . . . .
>
> MRS. JENSEN -- reported back to the council stating the Union accepted the 10% increase in salaries as offered

plus adding a paragraph to Article #17 negotiations with employer and employee to begin February, 1982. Termination of Contract June 30, 1982. This was in agreement with the Mayor and Council.
(Joint Exhibit III).

This was the second and final negotiations meeting of the parties. Neither the Union nor the City Council presented an insurance proposal. Shirley L. Mohr states that the City did not point out at this meeting that the employees would have to pay the increase in insurance premium cost. Mr. Cash stated that when he left this meeting, he definitely believed a verbal collective bargaining contract was approved by both parties.

8. After the August 17th meeting, the Union prepared copies of the new collective bargaining contract with the changes that were agreed to at the August 17th negotiating meeting. The new collective bargaining contract (AFSCME Exhibit 1) contained the same Article XIV, 8, as does the old collective bargaining contract (Joint Exhibit V) and a 10% increase in wages in Wage Schedule Adendum "A". Both Mr. Hyatt and the Mayor agree that the new collective bargaining agreement was presented to the City. Mr. Hyatt stated that the City would not sign the new collective bargaining contract because of some proof reading problem in the insurance article. Mr. Hyatt's statement is undisputed.

Shirley L. Mohr's assessment is that the City did not believe the collective bargaining agreement had to be changed to withhold insurance premiums from the employees' checks. The Mayor's assessment is the same as Mohr's above plus the City did not expect any changes in the collective bargaining contract because the insurance premium cost was part of the compensation or wage package.

9. The November 2, 1981 minutes of the City Council reflect the following:

. . . .

UNION CONTRACT -- was discussed regarding the over-sight in changing the language in the contract agreement for 1981-1982 that the employer pay full premium. The language should have been changed to read the Employer will pay the same premium as paid July, 1980. Any increase in premium to be paid by the Employee. Mayor Allen and the majority of the Council felt the Employees were well aware that the increase in Insurance premimums would not be paid by the City, and the increase in premium would be borne by the the employee. Allen Jimison was present representing the Union. Mayor Allen asked Mr. Jimison if he felt the Employees were aware that they were to pay the additional insurance premiums prior to it being deducted from their salary. He said he was not able to speak for the Union Employees, that the Council should ask the union employees. The Union felt the Contract was ratified when the representative appeared before the council accepting the 10% increase and it was agreed that there was no change in the language. Clerk Mohr checked in the previous minutes reporting a Special Meeting on June 26, 1981 to determine hospitalization between Blue Shield and Blue Cross, which stated majority of the employees preferred Blue Cross if it would reflect on their salaries, since the premium would be less. A motion was then made to award the hospitalization to Blue Cross. After considerable discussion, motion by Kuester to deny the Union's request to pay the additional increase in hospitalization insurance premium. Motion second by Taylor and unanimously carried.

(AFSCME Exhibit 2).

Shirley L. Mohr stated the meaning of "over-sight" is that the City intended to alter the collective bargaining agreement in reference to their insurance article.

10. The Mayor stated that he did not know if Nadiean Jensen, the Union's Chief Negotiator, was ever told at either meeting that the new insurance cost would be coming out of the 10% increase. Shirley L. Mohr stated that she cannot submit a statement that the Mayor or any agent of the City ever told the Union that the employees would be paying the increased insurance cost. Mr. Cash stated that he or no one from the Union was ever informed by the City, the Mayor, a Councilman or anyone representing the City that the employees would be paying the increased insurance premium costs. When Gerald Kuester was asked, do you know why the representative of the Union was not told the employees would be paying the

increased insurance premium costs, he stated that, "We thought the employees got 'the word' and they passed it on." Mr. Kuester and Shirley L. Mohr both felt and stated that the employees knew that they were to pay the increased insurance premium cost.

II. DISCUSSION

The first question is, what was the offer?

By looking at Joint Exhibit III, we find the Mayor stated the increase in wages was 10% with no language changes. When looking at the meaning of an offer and when in doubt of the offer's meaning, the offer should be interpreted against the proposer of the offer. The City initially proposed a 10% wage increase. Using this principle, I cannot make the logical jump to state that the 10% wage increase included the paying of the increased insurance premiums by the employees because wages are wages. I know no other way of stating such. Now, if the offer was a benefit package or wages and benefits or total compensation or some variation thereof, I could agree with the City. The above interpretation is also in agreement with the November 2nd minutes of the City Council. (AFSCME Exhibit 2).

Although I believe the employees knew that they were to pay part of the costs (Mr. Hyatt's statement that there was some understanding the workers were to pay part of the insurance premiums and Mr. Gerald Kuester's and Shirley L. Mohr's assessment that the employees knew they were to pay the increased insurance premium cost), I disagree with the City on the effect of such knowledge. I fully agree with the informal, away from the collective bargaining table discussions, for these discussions smooth over many otherwise hard disagreements of the formal collective bargaining table. But in negotiations, the conclusions of the

informal discussions must come back to the formal bargaining table for formal presentation and acceptance. If this is not required, neither party would know where the other party stood and the collective bargaining arena would be total chaos. This is exactly what we have here.

Also, by giving effect to away from the bargaining table discussions I would have a situation where all the parties questioning the authority of the participants and possibly be violating the democratic requirements of a Union. (See Section 39-31-206 MCA). The democratic requirements of a Union are generally thought of as adequate notice of meetings, an opportunity for a full discussion of the issue and a vote by majority rule.

Looking at Fact #5, we also find that Mr. Cash and Shirly L. Mohr both agree that Mr. Hyatt stated he could not speak for the Union membership. Therefore, the informal, away from the collective bargaining table discussions has no effect on negotiations until they are formally presented at the collective bargaining table.

The second question is, was there a tentative agreement on August 17, 1981?

Looking again at Joint Exhibit III, we find the City offered a 10% wage increase with no wording changes. The Union took the City's offer under advisement by requesting a meeting with the Union employees. Shortly thereafter, the Union reported back to the City Council, accepted the 10% increase in salaries and offered additional wording to Article 17. The City Council agreed. By looking at the actions of the parties, I can only conclude that there was an offer and an acceptance. Therefore, the standard of an offer and the acceptance of that offer has been reached and a tentative agreement exists.

By reviewing the same sequence of events, a second test may be used to determine if a tentative agreement exists. The second test, is was there a meeting of the minds? With the last statement in Joint Exhibit III stating "this was in agreement with the Mayor and City Council", and with Mr. Cash's assessment of a tentative agreement in Fact #7, and with the Union preparing and presenting a new collective bargaining contract to the Mayor, I can only conclude by the actions of the parties that they believed a meeting of the minds had taken place.

The third question is, can a party to the negotiations withdraw a tentative agreement?

In unfair labor practices charge 25, 26, 27, 36-1976, Columbia Falls Education Association v. Columbia Falls School District #6, the Board of Personnel Appeals upheld the hearing examiner's recommended order where the hearing examiner found the employer violated Montana Collective Bargaining Act by withdrawing earlier concessions. The hearing examiner cited San Antonio Machine Corp. v. NLRB, 363 F.2d, 633, 62 LRRM 2674, 1966, and cited American Seeding Com. v. NLRB, 424 F.2d 106, 73 LRRM 2996, 1970, which states,

. . . .

> It is well established that withdrawal by the employer of contract proposals, tentatively agreed to by both the employer and the union in earlier bargaining sessions, without good cause, is evidence of a lack of good faith bargaining by the employer in violation of Section 8(a)(5) of the Act, regardless of whether the proposals constituted valid offers subject to acceptance under traditional law.
>
> (73 LRRM at 2998).

Using the above NLRB case law and looking at the facts at hand, the test becomes, did the City have good cause to withdraw from the tentative agreement of August 17, 1981?

To this hearing examiner, good cause would have to be a matter which is not in the control of one or more of the parties. A few examples of such matters are the failure of a school mill levy vote, a fire which destroys a school, or a flood which destroys the City water plant. In this case, we have cause being the over-sight in the change in language plus an assessment by both Shirley L. Mohr and the Mayor that no change is needed in the collective bargaining agreement to withhold insurance premiums from the employees' checks. I do not believe this is good cause because the over-sight and the assessments are within the full control of the City. Also, if I approve this type of action as good cause, what would stop a party to the negotiations from reviewing their past actions at the collective bargaining table and withdrawing their concessions on the grounds of an over-sight when the real reason for the withdrawal was a better view of the facts from a 20/20, hind-sight position.

The fourth question is, what is the parties' obligation to sign a collective bargaining contract?

Section 8(d) of the NLRA states:

. . . .

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

(29 USC Section 158(d)).

The NLRB and the Courts have long held that for an employer to refuse to execute an agreement incorporating the terms of a negotiated contract when requested is a violation of Section 8(a)(5) of the NLRA. (See H.J. Heinz Co. v.NLRB, 311 U.S. 514, 7 LRRM 291, 1941; NLRB v. Ogle Protection Service,

Inc., 375 F.2d 497, 64 LRRM 2792, CA 6th, 1967; NLRB v. Ohio Car & Truck Leasing, Inc., 361 F.2d 404, 62 LRRM 2262, CA 6th, 1966; NLRB v. Strong, 393 U.S. 357, 70 LRRM 2100, 1969). Section 8(a)(5) of the NLRA states "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with a representative of his employees . . . " (29 USC Section 158(5)). Section 39-31-401(5) MCA states "It shall be an unfair labor practice for a public employer to . . . refuse to bargain collectively in good faith with an exclusive representative." The two above sections appear to be substantially equal.

Furthermore, 39-31-305(2) MCA provides that,

> For the purposes of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or his designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

Section 39-31-306 MCA states:

> (1) Any agreement reached by the public employer and the exclusive representative shall be reduced to writing and shall be executed by both parties.

Both Sections 39-31-305 MCA and 39-31-306 MCA are equivalent to Section 8(d) of the NLRA with the exception that Section 8(d) of the NLRA has the statement "if required" while Montana's Collective Bargaining Act is silent in this provision. But, to this hearing examiner, this difference does not make the use of the NLRB's precedent unworkable if I read the NLRA as one party always requesting that a collective bargaining contract be signed. Using the NLRA for guidance, it is a violation of Montana's Collective Bargain-

ing Act, Section 39-31-401(5) MCA for an employer to refuse to execute a completed collective bargaining contract.

With a collective bargaining contract in the form of a tentative agreement on August 17th and with the undisputed fact that the City refused to sign a collective bargaining contract (See Fact #8, Hyatt's statement), I can only conclude that the City violated Montana's Collective Bargaining Act Section 39-31-401(5) MCA.

III. REMEDIES

Section 10(c) of the NLRA provides for the following remedies:

. . . .

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . .

The U.S. Supreme Court in H.J. Heinz Co. v. NLRB, supra, set forth the following teachings when enforcing an NLRB order to sign a collective bargaining agreement:

. . . .

> It is conceded that although petitioner has reached an agreement with the Union concerning wages, hours and working conditions of the employees, it has nevertheless refused to sign any contract embodying the terms of the agreement. The Board supports its order directing petitioner, on request of the Union, to sign a written contract embodying the terms agreed upon on the ground, among others, that a refusal to sign is a refusal to bargain within the meaning of the Act.
>
> In support of this contention it points to the history of the collective bargaining process showing that its object has long been an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing, which serves both as recognition of the union with which the agreement is reached and as a permanent memorial of its terms. This experience has shown that refusal to sign a written contract has been a not infrequent means of frustrating the bargaining process through the refusal to recognize the labor

organization as a party to it and the refusal to provide an authentic record of its terms which could be exhibited to employees, as evidence of the good faith of the employer. Such refusals have proved fruitful sources of dissatisfaction and disagreement. Contrasted with the unilateral statement by the employer of his labor policy, the signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife.

Before the enactment of the National Labor Relations Act it had been the settled practice of the administrative agencies dealing with labor relations to treat the signing of a written contract embodying a wage and hour agreement as the final step in the bargaining process. Congress, in enacting the National Labor Relations Act, had before it the record of this experience, H. Rept. No. 1147, 71st Cong., 1st Sess., p. 5, and see also pp. 3, 7, 15-18, 20-22, 24; S. Rept. 9, 13, 15, 17. The House Committee recommended the legislation as "an amplification and clarification of the principles enacted into law by the Railway Labor Act and by Section 7(a) of the National Industrial Recovery Act." H. Rep. 1147, supra, P. 3, and stated, page 7, that Sections 7 and 8 of the Act guaranteeing collective bargaining to employees was a reenactment of the like provision of Section 7(a) of the National Industrial Recovery Act, see Consolidated Edision Co. v. Labor Board, 305 U.S. 197, 236 [3 LRRM 645, 656]; Labor Board v. Sands Mfg. Co. 306 U. S. 332, 342 [4 LRRM 530, 534].

We think that Congress, in thus incorporating in the new legislation the collective bargaining requirement of the earlier statutes included as a part of it, the signed agreement long recognized under the earlier acts as the final step in the bargaining process. It is true that the National Labor Relations Act, while requiring the employer to bargain collectively, does not compel him to enter into an agreement. But it does not follow, as petitioner argues, that, having reached an agreement, he can refuse to sign it, because he has never agreed to sign one. He may never have agreed to bargain but the statute requires him to do so. To that extent his freedom is restricted in order to secure the legislative objective of collective bargaining as the means of curtailing labor disputes affecting interstate commerce. The freedom of the employer to refuse to make an agreement relates to its terms in matters of substance and not, once it is reached, to its expression in a signed contract, the absence of which, as experience has shown, tends to frustrate the end sought by the requirement for collective bargaining. A business man who entered into negotiations with another for an agreement having numerous provisions, with the reservation that he would not reduce it to writing or sign it, could hardly be thought to have bargained in good faith. This is even more so in the case of an employer who, by his refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining.

> Petitioner's refusal to sign was a refusal to bargain collectively and an unfair labor practice defined by Section 8(5) [1 LRRM 806]. The Board's order requiring petitioner at the request of the Union to sign a written contract embodying agreed terms is authorized by Section 10(c) [1 LRRM 807]. This is the conclusion which has been reached by five of the six courts of appeals which have passed upon the question. Affirmed
>
> (7 LRRM at 296-297).

The U.S. Supreme Court in NLRB v. Strong, supra, set forth the following back payment of fringe benefits when the employer refused to sign a collective bargaining contract:

. . . .

> The Union filed unfair labor practice charges with the National Labor Relations Board, which found that respondent's refusal to sign the contract which had been negotiated on his behalf by the Association was a violation of Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. Sections 158(a)(5) and (1). The Board ordered respondent to sign the contract, cease and desist from unfair labor practice, post notices, and "[p]ay to the appropriate source any fringe benefits provided for in the above described contract." 152 NLRB 9, 14, 59 LRRM 1004 (1965). The Court of Appeals enforced the Board's order except as it required the payment of fringe benefits. That part of the order, the Court of Appeals said, "is an order to respondent to carry out provisions of the contract and is beyond the power of the Board." 386 F.3d 929, 933, 65 LRRM 3012 (1967). The Government sought and we granted certiorari as to this holding. 391 U.S. 933 (1968).
>
> Believing the remedy provided by the Board was well within its powers, we reverse the judgment of the Court of Appeals. Section 10(c) of the Act empowers the Board when it adjudicates an unfair labor practice to issue "an order requiring such person to cease and desist from such unfair practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." 61 Stat. 147, 29 U.S.C. Sections 160(c). This grant of remedial power is a broad one. It does not authorize punitive measures, but "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197, 8 LRRM 439 (1941). Back pay is one of the simpler and more explicitly authorized remedies utilized to attain this end.
>
> (70 LRRM at 2100-2101).

But, the remedial powers of the NLRB are limited to carrying out the policies of the NLRA. The U.S. Supreme Court in Porter Co. v. NLRB, 397 U.S 99, 73 LRRM 2561, 1970,

said the NLRB has no power to compel a party to agree to substantive terms of a collective bargaining contract. Although an employer improperly repeatedly refused to bargain on check-off of union dues, the NLRB could not order the employer to grant the union a contract clause providing for dues check-off. The NLRB in Mead Corp, 256 NLRB 108, 107 LRRM 1309, 1981, ordered the employer that unlawfully withdrew a mid-term wage proposal just as the Union was about to accept it to reinstate the proposal. In the Mead Corp., supra, the NLRB said:

. . . .

> The instant case is readily distinguishable from H.K. Porter [supra]. Involved here is a proposal that Respondent formulated and voluntarily offered, not one offered to Respondent and consistently opposed by it. It is this voluntary nature of Respondent's conduct that demonstrates that we are not compelling agreement or the making of a concession within the meaning of Section 8(d). Respondent agreed to abide by the proposal if accepted by the Union, but then reneged on that agreement by unlawfully withdrawing the proposal just as the Union was about to accept it. Unlike H.K. Porter, the remedy that we order herein merely requires Respondent to do what it had previously agreed to do. Thus, we simply reestablish the status quo as it was prior to Respondent's unlawful conduct.
>
> (107 LRRM at 1310).

Section 39-31-406 MCA gives the following remedial powers to the Board of Personnel Appeals:

. . . .

> If, upon the preponderance of the testimony taken, the Board is of the opinon that any person named in the complaint has engaged in or is engaging in an unfair labor parctice, it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter . . . .

By comparing Section 10(c) of the NLRA to Section 39-31-406 MCA I view them as substantially equal and view the Board of Personnel Appeals to have the same remedial powers as does the NLRB. The District Court of the Eleventh

Judicial District of the State of Montana, in and for the County of Flathead, in Board of Trustees of School District #38, Flathead and Lake Counties v. Board of Personnel Appeals and Bigfork Educational Association, DV-79-425, ULP 20, 22, 25, 26, 36-1978, 1980, enforced a Board of Personnel Appeals order that judged the NLRB and the Board of Personnel Appeals to have equal remedial powers.

To the case at hand and with the parties reaching a tentative agreement on August 17th, for a 10% increase in wages, with the parties tentatively agreeing only to the wording changes in Article 17, and with the City refusing to sign a collective bargaining agreement incorporating those tentative agreements, I will order the City to sign the collective bargaining agreement incorporating the tentative agreement changes of August 17th, and will order the City to pay all wages and fringe benefits required by the collective bargaining contract to the employees covered by the collective bargaining contract that are or have been employed by the City from July 1, 1981 to the date of settlement of this charge. I believe this order to be in full compliance with Porter, supra, because the City offered a 10% increase in wages and the Union offered a 10% increase in wages with the wording changes to Article 17 which the City Council agreed to. I have made no substantive additions to the collective bargaining contract because both parties agreed to the 10% increase in wages and the wording changes to Article 17. By so ordering, I am in full agreement with and fully believe in the teachings of Heinz, supra, Strong, supra, Porter, supra, and Mead Corp., supra.

Because the record lacks any signs of an anti-union attitude on the part of the defendants, an order requiring such things as a reimbursement to the Union of expenses associated with this charge, a quarterly calculation plus

interest on wages and benefits the employees would have received, and posting of cease and desist notices would be inappropriate.

IV. CONCLUSIONS OF LAW

For reasons set forth above, the defendants did violate the Collective Bargaining for Public Employees Act, Section 39-31-401(5) MCA by not honoring the tentative agreement reached on August 17, 1981, and by not signing the collective bargaining contract incorporating the tentative agreement changes when requested by the plaintiff.

V. RECOMMENDED ORDER

1. The defendants are ordered:

a. to cease and desist from engaging in bad faith bargaining in violation of Section 39-31-401(5) MCA;

b. to sign a collective bargaining contract with the plaintiffs incorporating all the tentative agreement changes of August 17, 1981;

c. to pay all wages and fringe benefits required by the collective bargaining contract to the employees covered by the collective bargaining contract that are or have been employed by the City from July 1, 1981 to date of settlement of this charge; and

d. to inform the Board of Personnel Appeals and the complainant of compliances with this Recommendation Order within thirty (30) days of receipt of the Recommended Order.

2. All other remedies requested by the complainant are denied.

Dated this 27th day of May, 1982.

BOARD OF PERSONNEL APPEALS

BY: Rick D'Hooge
Hearing Examiner